IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No.

ALFRED MAINELLA,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Courts Below

There was no opinion rendered by the Trial Court relating to the within petitioners. The opinion of the Circuit Court below (R. 898-918), rendered on May 28, 1943, is still unreported.

II

Jurisdiction

A

The Court is respectfully referred to Subdivision II of the petition (supra, p. 2) on the question of Jurisdic-

tion. Said Subdivision II is herewith adopted and made a part of this brief.

III

Statement of the Case

A statement of the case has been made in the preceding petition under I (pp. 2-9), which is hereby adopted and made a part of this brief.

IV

Specification of Errors

The Errors relied upon are those set forth in the questions presented in Paragraph III of the foregoing petition, which are hereby adopted and made part of this brief.

V

Statutes and Regulations Involved

The Statutes and Regulations involved are set forth in the appendix.

ARGUMENT

A

The misconception of the learned Court below of the nature and extent of the evidence against the petitioner, Alfred Mainella, and the nature and extent of the evidence against him actually contained in the Record, are discussed in the foregoing petition.

Divorced of all the matter which was admitted into evidence as against certain defendants only, but not admitted as to the petitioner by express ruling of the Court, the

Record shows no more was proved in support of the petitioner's conviction than the following, namely:

The petitioner, a retail druggist having his place of business in Corona, N. Y., purchased and sold to one Liss, a total of 112 gallons of an exempt narcotic preparation known as lead and opium wash. This total was sold in a series of seven transactions extending over a period of three to four months. Each of the sales was made at Liss' solicitation and in reliance upon his representation that the wash was for use as a liniment for race horses.

The petitioner had known Liss prior to the time of the sales, as a licensed pharmacist and had in fact employed him for a short period of time in his own store. There had been nothing in the petitioner's former relations with Liss to lead him to believe, at least initially, that there was any reason to doubt Liss' representations. Some time later, however, Liss' repeated orders caused the petitioner to become uncertain as to his own status in making sales of the wash in quantity, and he thereupon refused to fill any further orders from Liss.

In view of the nature and extent of this proof, it is evident that the learned Court below sustained the petitioner's conviction on the wholly erroneous assumption that the mere sale by Mainella of lead and opium wash to Liss with the assumed knowledge that Liss' purpose was not to use the said wash as medicine was sufficient to sustain the conviction on the ground of conspiracy.

As succinctly stated by this learned Court in *Direct Sales Co., Inc.* v. *United States*, decided June 14, 1943, and reported at 63 S. C. 1265:

> "* * * one does not become a party to a conspiracy by aiding or abetting it by sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally * * *."

In addition to the mere fact of knowledge, there must, of course, be proof, clear and unequivocal, of the seller's intent to further, promote and co-operate in the buyer's illegal use of the article and of his intent to make himself a party to the buyer's venture.

> *Direct Sales Co., Inc.* v. *United States* supra; *Falcone* v. *United States,* 311 U. S. 205.

In the immediate case, it seems evident that, quite unlike the evidence in the *Direct Sales Co., Inc.,* case, the evidence adduced against the petitioner does not support a finding that the petitioner intended in any way to further, promote or co-operate in Liss' illegal use of the lead and opium wash. On the contrary, the evidence expressly negatives any such finding in that it shows that the petitioner, immediately upon his suspicions being aroused, rejected any further orders from Liss and completely terminated the transactions.

At the very most, the evidence shows nothing more than that for some time the petitioner acted with "indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end."

It is submitted that upon such evidence the learned Court below was wholly unjustified in sustaining the petitioner's conviction herein, and that its judgment of affirmance should be reversed, in view of the rulings of this Court in the cases hereinabove cited.

The foregoing conclusion is reached even though, for the purpose of the argument, the petitioner has assumed as proved a fact which the learned Court below held to be established notwithstanding that there is not an iota of evidence in the Record to support its assumption, namely: that the petitioner sold the lead and opium wash to Liss with knowledge that Liss intended to use the same for a non-medicinal purpose and that the jury could have properly and in all probability did assume that the petitioner, as a druggist, "must have known that he was in an illicit enterprise when he bought the lead wash,

because these two (Liss and Conte) had been engaged in an earlier illicit enterprise, and in short (as the lower Court found) the jury have imputed to the druggist the mens rea of Liss and Conte".

Where in the entire Record is there even the semblance of any testimony, properly adduced against the petitioner, Alfred Mainella, which in the slightest supports any such finding, or which warranted the jury in finding that Mainella knew of Liss and Conte's earlier illicit enterprises, or that any of the actions of Mainella in this entire Record show his joining in any plan or conspiracy to deal with this lead and opium wash illicitly? All that has been shown was that the petitioner engaged in some "casual transactions, not amounting to a course of business regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end" (footnote 8, *Direct Sales Co., Inc.* v. *United States,* supra).

B

In view of the total paucity of evidence presented to show the petitioner's guilty complicity in the conspiracy charged, it seems certain that his conviction by the jury, and the subsequent affirmance of that conviction by the learned Court below, must be ascribed to the fact that the petitioner was not accorded a fair and impartial trial.

Thus, while this petitioner adopts the arguments on this point set forth in the petitions and briefs of his co-petitioners herein, and the dissenting opinion of Mr. Justice Frank in the Court below, and for the purpose of brevity and economy does not repeat those arguments in extenso, it must be apparent from the fact that even the learned Court below was wholly unable to analyze correctly the evidence against the petitioner that the methods and procedure followed on the trial totally confused and misled the jury and left them at the termination of the trial without any conception as to which of the many

charges made in the indictment related to any particular defendant, and what part of the vast maze of evidence bore on the Government's case against any particular defendant.

Certainly, if the learned Justices below, with the printed Record before them for their perusal, were unable, by reason of the very confusion and prolixity of the Record, to evaluate the proof against the petitioner, it is self-evident that the misjoinder in the indictment of multiple and unrelated conspiracies with different personnel alleged to be involved in each conspiracy, and all but one of them being totally unrelated to the case against the petitioner, and the subsequent mass trial of the twenty distinct defendants without any proper distinction being made among them with respect to the particular charge or charges on which they were being prosecuted, coupled with the Trial Court's failure to enlighten the jury and properly charge them upon the issues involved, should lead to one finding: the petitioner was not accorded a fair trial, and there was error of such a substantial and prejudicial nature as to require the reversal of his conviction.

McElroy v. *United States,* 164 U. S. 76;
United States v. *Smith,* 112 Fed. (2d) 83, 85.

CONCLUSION

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

Respectfully submitted,

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Counsel for Petitioner.